

UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF CALIFORNIA

NO. 10-CV-03692-JF

JOSEPH HENNING

Plaintiff

v.

WACHOVIA MORTGAGE, FSB

Defendant

**PLAINTIFF'S MOTION TO VACATE JUDGMENT AND TO
TRANSFER CASE BACK TO THE DISTRICT OF
MASSACHUSETTS / By Affidavit**

Plaintiff moves pursuant to the *Federal Rules of Civil Procedure Rule 60(a)* and *60(b)(1) & (5)* that the Judgment of dismissal entered with prejudice in this Action based on a class action settlement be vacated because the Plaintiff has properly and timely opted out of the class action that led to the entry of Judgment and that this case be transferred back to the District of Massachusetts given the fact that apparently all other matters in the multi-district litigation of which this Action is part have been resolved. Plaintiff submits the following through Plaintiff's Counsel stating the following to be true upon his own personal knowledge:

1. Attached as Exhibit 1 is a true and accurate copy of the cover page and page 8 of the first notice sent to Plaintiff and Plaintiff's Counsel of this Court's class action approved settlement in *In re Wachovia Corporation*, #09-02015-JF that apparently included as a class member this Plaintiff Henning's claims against Wachovia Mortgage Corporation that is docketed as this action No. 10-CV-03692-JF.

2. Page 8 of the attached class action notice states the procedure by which Plaintiff Henning was to opt out of the class action settlement as follows:

To exclude yourself from settlement, you must send a letter that includes the following:

- Your name, address, and telephone number,
- The name of the case (*In Re: Wachovia Corp. "Pick-a-Payment" Mortgage Marketing and Sales Practices Litigation, Case No. M:09-CV- 2015*),
- A statement that you want to be excluded from the Settlement, and
- Your signature.

You must mail your exclusion request, postmarked no later than **March 16, 2011**, to:

Pick-a-Payment Exclusions
P.O. Box 2448
Faribault, Minnesota 55021-9148

3. Attached as Exhibit 2 is a true and accurate copy of Plaintiff Joseph Henning's letter dated 15 February, 2011 addressed as stated in the above-referenced Page 8 containing the information and statement required in the above-referenced Page 8.

4. Attached as Exhibit 3 is a true and accurate copy of the certified mail receipt sending out the Plaintiff Henning's exclusion letter dated 19 February 2011 and the returned receipt from Pick-a-Payment Exclusions signed by a Judd Damon on 23 February 2011 which is well within the required deadline of 16 March 2011.

THEREFORE, Plaintiff as ordered by this Court has properly and timely excluded himself from the class action and Judgment dismissing this Action should not have been entered based on the class action settlement. FURTHERMORE, because it appears that the class action settlement has resolved all cases in this multi-district litigation except for Plaintiff Henning, THEREFORE, Plaintiff respectfully requests that this Henning matter be sent back to the District of Massachusetts for litigation and hearing on the merits.

The above facts are stated under the pains and penalties of perjury this date:

Plaintiff by his attorney,

/s/ Valeriano Diviacchi
BBO# 555940
Diviacchi Law Office
111 Beach Street #1A
Boston, MA 02111-2532
617-542-3175
val@diviacchi.com

Date: 18 May 2011

CERTIFICATE OF SERVICE

I hereby certify that on 18 May 2011 I electronically filed the foregoing document with the United States District Court for the District of California by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

For Defendant,

Attorney David M. Bizar
McCarter & English, LLP
265 Franklin Street
Boston, MA. 02110

/s/ Valeriano Diviacchi